

**STATE BOARD OF EQUALIZATION**

450 N STREET, SACRAMENTO, CALIFORNIA
(PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082)
TELEPHONE (916) 322-2976
FAX (916) 323-3387

JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

ERNEST J. DRONENBURG, JR.
Third District, San Diego

BRAD SHERMAN
Fourth District, Los Angeles

KATHLEEN CONNELL
Controller, Sacramento

E. L. SORENSEN, JR.
Executive Director

July 1, 1996

Mr. W--- J. L---
General Manager
M---
XXX --- ---
--- ---, CA XXXXX

Re: M---
S- -- XX-XXXXXX

This is in response to your letter dated May 24, 1996 regarding the application of tax to sales of food products. You state:

“Our company will sell a nutritional food supplement that consumers will order from us by calling a toll free number. They will pay for purchases by credit card. The product, to be called Somatogain, is in powdered form and must be mixed with liquid before it is consumed....”

You have attached a copy of the label for Somatogain. You have also enclosed empty cans of Ensure and Ensure Plus, and you indicate your belief that your product is similar to Ensure and Ensure Plus.

DISCUSSION

A retailer owes sales tax on its retail sales of tangible personal property in California, measured by gross receipts, unless the sales are specifically exempt from taxation by statute. (Rev. & Tax. Code § 6051.) A retailer may collect reimbursement from its purchasers for its sales tax liability if its contracts of sale provide for such reimbursement. (Civ. Code § 1656.1.)

When sales tax does not apply, the use tax, measured by the sales price of the property sold, applies to the use of property purchased from a retailer for storage, use, or other consumption in California unless such use is specifically exempt from taxation by statute. (Rev. & Tax. Code §§ 6201, 6401, Reg. 1620.) Although the purchaser owes the use tax, a retailer engaged in business in this state is required to collect the use tax from the purchaser and to pay that tax to this state. (Rev. & Tax. Code §§ 6202, 6203, 6204.)

Section 6359 provides an exemption from sales and use taxes for sales of food products for human consumption under certain circumstances, as explained in Regulation 1602 (copy enclosed). While subdivisions (a)(1) and (a)(2) of Regulation 1602 contain lists of products that are considered food products for purposes of section 6359, subdivision (a)(5) explains that certain other products are excluded from the definition of food products:

“(5) ‘Food products’ do not include any product for human consumption in liquid, powdered, granular, tablet, capsule, lozenge, or pill form (A) which is described on its package or label as a food supplement, food adjunct, dietary supplement, or dietary adjunct, and to any such product (B) which is prescribed or designed to remedy specific dietary deficiencies or to increase or decrease generally one or more of the following areas of human nutrition:

1. Vitamins
2. Proteins
3. Minerals
4. Caloric intake

“In determining whether a product falls within category (B), it is important whether the manufacturer has specially mixed or compounded ingredients for the purpose of providing a high nutritional source. For example, protein supplements and vitamin pills are taxable as food supplements.

“Other items, such as cod liver oil, halibut liver oil, and wheat germ oil, are considered dietary supplements and thus subject to tax even though not specially compounded. However, unusual foods such as brewer’s yeast, wheat germ and seaweed are not subject to tax except when their label states they are a food supplement or the equivalent. Finally, the compounding of nutritional elements in items traditionally accepted as food does not make them taxable, e.g. vitamin-enriched milk and high protein flour.

“Tax, however, does not apply to any such products which either are exempted by Revenue and Taxation Code section 6369, respecting prescription medicines, or are complete dietary foods providing the user in the recommended daily dosage with substantial amounts of vitamins, proteins, minerals and foods providing adequate caloric intake. An example of the latter is a food daily providing the user with the following:

1. 70 grams of high quality protein
2. 900 calories
3. Minimum daily requirements as established by the regulations of the Federal Food and Drug Administration of the following vitamins: A, B1, C, D, Riboflavin, and Niacin or Niacinamide; and following minerals: Calcium, Phosphorous, Iron and Iodine."

In order to determine whether a product is included in or excluded from the definition of "food product," we first ask whether the product is in one of the enumerated forms--liquid, powdered, granular, tablet, capsule, lozenge, or pill. If so, then the sales of that product are subject to tax if either of the two following conditions also occurs: (A) the product is described as a food supplement, food adjunct, dietary supplement, or dietary adjunct on its labels or packaging, or (B) the product is prescribed or designed to remedy a specific dietary deficiency or to increase or decrease generally the intake of vitamins, protein, minerals, or calories.

The label identifies Somatogain, which is in powdered form, as a dietary supplement; therefore, it is excluded from the definition of "food product" by subdivision (a)(5)(A) of Regulation 1602. The label directs the user as follows: "For best results, drink 3 servings daily for 7 days, and then maintain at 1-2 servings a day." Each serving is listed as containing 156 calories and 0 grams of protein, and the label contains this statement: "Not a significant source of fat, cholesterol, dietary fiber, vitamin A, vitamin C, and iron." It is clear from these nutrition facts listed on the label that Somatogain does not contain sufficient amounts of protein, calories, and other vitamins and minerals for it to be considered a complete dietary food as that term is defined in Regulation 1602. Since Somatogain is a dietary supplement excluded from the definition of "food product" under subdivision (a)(5) of Regulation 1602, and since it is not considered a complete dietary food under that regulation, its sales are not excluded from tax under Regulation 1602.

You state that you believe Somatogain is similar to Ensure and Ensure Plus. We have previously determined that Ensure and Ensure Plus, which continue to be advertised as nutrition products that constitute complete dietary foods, are "food products" as that term is defined in Regulation 1602. (Business Taxes Law Guide Annotation 245.1420 (10/31/84).) The labels for Ensure and Ensure Plus identify those products as "complete, balanced nutrition," and "high-calorie complete nutrition," respectively. In contrast, the following statement regarding Somatogain appears on its label: "Its unique, patent pending formula - - which provides a 'metabolic support system' for the body - - complements foods and powdered or liquid nutritional and protein supplements." It is clear from the labels you have provided that unlike Ensure and Ensure Plus, Somatogain is not a complete dietary food intended to be the user's sole source of nutrition. Therefore, while sales of Ensure and Ensure Plus continue to be exempt from tax under Regulation 1602, sales of Somatogain will be subject to tax as discussed above.

Mr. W--- J. L---

-4-

July 1, 1996
245.1293

You have requested a copy of pamphlet 61. We are unable to send you a copy of our most recently printed version of the pamphlet at this time because it is not up to date. We are currently in the process of updating that pamphlet so that it will include recent statutory and regulatory changes. If you have questions about specific areas of the Sales and Use Tax Law, please call or write us at the telephone number or address listed above.

You have asked whether it is required that you get separate written opinions with respect to other products for human consumption that you plan to sell. In order to rely on our advice regarding how tax applies to a particular product, you should send a written inquiry about that product along with a label for that product. The inquiry must meet the requirements of Revenue and Taxation Code section 6596, a copy of which is enclosed. If you have further questions, please feel free to write again.

Sincerely,

Kelly W. Ching
Tax Counsel

KWC:cl

Enclosures (2)

cc: -- District Administrator